STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 9, 2006
v	No. 256063 Oakland Circuit Court
ERIC L. HARRINGTON, Defendant-Appellant.	LC No. 03-193467-FC

Before: Whitbeck, C.J., and Saad and O'Connell, JJ.

PER CURIAM.

Defendant appeals his jury trial convictions of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(f). The trial court sentenced defendant as a third habitual offender, MCL 769.11, to concurrent prison terms of fifteen to forty years for the first-degree CSC convictions. We affirm.

I.

Defendant claims that the trial court denied his due process rights and his right to an impartial jury when it failed to hold a hearing to determine whether an extraneous influence could have affected the jury's verdict. Defendant failed to preserve his claim by objecting or moving for a mistrial in the trial court. *People v Carter,* 462 Mich 206, 214; 612 NW2d 144 (2000). Accordingly, we review this issue for plain error affecting defendant's substantial rights. *People v Carines,* 460 Mich 750, 763, 774; 597 NW2d 130 (1999).

A defendant tried by a jury has a right to a fair and impartial jury. *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). During deliberations, the jury may consider only the evidence presented in open court, and may not consider extraneous facts not introduced into evidence. *Id*. To establish that an extrinsic influence requires reversal, the defendant must first prove: (1) that the jury was exposed to extraneous influences and (2) that there was a real and substantial possibility that these influences could have affected the jury's verdict. *Id.* at 88-89.

If the defendant meets this initial burden, then the burden shifts to the prosecutor to demonstrate that the error was harmless beyond a reasonable doubt.[1]

Here, the jury began its deliberations on Friday, April 23, 2004, and it returned a guilty verdict on the first-degree CSC charges on Monday, April 26, 2004. After the trial court excused the jury, Jurors One, Ten, Four, and Eight remained in the courtroom to talk to the judge. The jurors told the judge on the record that Juror Twelve, who was not present during the post-verdict discussion, heard defendant's girlfriend, Kimberly Jones, allegedly threaten him on Friday, April 23, 2004. According to the jurors, as Juror Twelve and others passed Jones during a lunch break that day, Juror Twelve heard Jones say that if he failed to reach a not guilty verdict, he would be killed. Of the jurors who reported the incident to the judge, only Juror Eight was present during the alleged threat and he merely heard Jones say the words "not guilty" and "kill." The other jurors heard about the incident from Juror Twelve or others after the jury reached a verdict on Monday.

Defendant has not shown that the jury was exposed to extraneous influences that created a real and substantial possibility of affecting the jury's verdict. *Budzyn, supra* at 88-89. First, defendant did not present any admissible evidence, such as affidavits, to support his argument that Juror Twelve was exposed to Jones' threat. Rather, he relies on statements of four other jurors, and those statements are merely hearsay. The record shows that none of the four jurors personally heard Jones' threat to Juror Twelve in its entirety nor were they certain of what they heard. Absent evidence to support his argument, it is unclear what portion of Jones' threat Juror Twelve actually heard. Further, if Juror Twelve heard the entire threat, it is unclear what negative effect it could have had on defendant's case. Defendant's argument that Jones' threat was or may have been considered during deliberations or possibly affected the verdict is based on unsupported speculation. In fact, Juror Eight reported that Juror Twelve discussed Jones' threat with other jurors "*after the verdict was decided upon*." (Emphasis added.)

Moreover, the trial court instructed the jury to consider only the evidence properly admitted in court and, before deliberations, the court reminded the jury that it took an oath to return a verdict based only on the properly admitted evidence and the law as given by the court. Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). For these reasons, we hold that the trial court correctly declined to hold an evidentiary hearing and defendant has not shown plain error affecting his substantial rights. *Carines, supra* at 763, 774.[2]

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[1] "Generally, jurors may not impeach their own verdict by subsequent affidavits showing misconduct in the jury room." *Id.* at 91. "Once a jury has been polled and discharged, its members may not challenge mistakes or misconduct inherent in the verdict. Rather, oral testimony or affidavits may only be received on extraneous or outside errors, such as undue influence by outside parties." *Id.*

[2] Also, defendant contends that if the trial judge's post-verdict conversation with the four jurors is deemed to be a hearing, defendant is entitled to retrial on the basis that he was denied his Sixth Amendment right to counsel. Generally, defendant's right to be present at his trial extends to all conferences or occurrences at the trial wherein or whereby his substantial rights may be affected.

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II.

Defendant argues that the trial court erred when it found that the prosecutor exercised due diligence in attempting to locate and produce an endorsed witness, Nicole Morton. He further contends that the trial court erred when it refused to give his requested missing-witness instruction to the jury. This Court reviews this issue for an abuse of discretion. *People v Eccles*, 260 Mich App 379, 389; 677 NW2d 76 (2004).

While the missing witness instruction, CJI2d 5.12,[3] may be appropriate under certain circumstances, here, the trial court did not abuse its discretion when it declined to give the instruction. *People v Perez*, 469 Mich 415, 420; 670 NW2d 655 (2003).[4] Under MCL 767.40a, a prosecutor is not required to produce res gestae witnesses at trial. As our Supreme Court

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People v Bowman, 36 Mich App 502, 510; 194 NW2d 36 (1971). Here, however, because the judge's post-verdict conversation with the jurors occurred after the trial and after the jury was excused, it was not a hearing. Therefore, defendant's contention is without merit.

[3] CJI2d 5.12 provides that, if the prosecutor fails to call a listed witness, the jury "may infer that [the] witness's testimony would have been unfavorable to the prosecution's case."

[4] MCL 767.40a was amended in 1986 and provides:

> (1) The prosecuting attorney shall attach to the filed information a list of all witnesses known to the prosecuting attorney who might be called at trial and all res gestae witnesses known to the prosecuting attorney or investigating law enforcement officers.
>
> (2) The prosecuting attorney shall be under a continuing duty to disclose the names of any further res gestae witnesses as they become known.
>
> (3) Not less than 30 days before the trial, the prosecuting attorney shall send to the defendant or his or her attorney a list of the witnesses the prosecuting attorney intends to produce at trial.
>
> (4) The prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties.
>
> (5) The prosecuting attorney or investigative law enforcement agency shall provide to the defendant, or defense counsel, upon request, reasonable assistance, including investigative assistance, as may be necessary to locate and serve process upon a witness. The request for assistance shall be made in writing by defendant or defense counsel not less than 10 days before the trial of the case or at such other time as the court directs. If the prosecuting attorney objects to a request by the defendant on the grounds that it is unreasonable, the prosecuting attorney shall file a pretrial motion before the court to hold a hearing to determine the reasonableness of the request.
>
> (6) Any party may within the discretion of the court impeach or cross-examine any witnesses as though the witness had been called by another party.

explained in *Perez, supra* "the Legislature replaced the prosecutor's duty to produce res gestae witnesses with 'an obligation to provide notice of known witnesses and reasonable assistance to locate witnesses on defendant's request.' " *Id*. at 418-419, quoting *People v Burwick*, 450 Mich 281, 289; 537 NW2d 813 (1995).

The missing witness instruction may be appropriately given "if a prosecutor fails to secure the presence at trial of a listed witness who has not been properly excused." *Perez, supra* at 420. The statute provides the method for properly excusing a listed witness and states that a prosecutor "may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties." MCL 767.40a(4). We note that this is not a situation in which the prosecutor simply decided not to call one of its listed witnesses. Indeed, here, the prosecutor could not have known that it would need to seek to excuse Morton until after trial began because Morton was scheduled to testify and she failed to appear. Our Courts nonetheless continue to require a showing of good cause if the prosecution must delete an identified witness from its witness list. As this Court explained in *Eccles, supra* at 388-389:

> A prosecutor who endorses a witness under MCL 767.40a(3) is obliged to exercise due diligence to produce that witness at trial. *People v Cummings*, 171 Mich App 577, 583-585; 430 NW2d 790 (1988). A prosecutor who fails to produce an endorsed witness may show that the witness could not be produced despite the exercise of due diligence. *People v Canales*, 243 Mich App 571, 577; 624 NW2d 439 (2000). If the trial court finds a lack of due diligence, the jury should be instructed that it may infer that the missing witness's testimony would have been unfavorable to the prosecution's case. CJI2d 5.12; see also *People v Snider*, 239 Mich App 393, 422; 608 NW2d 502 (2000). We review a trial court's determination of due diligence and the appropriateness of a "missing witness" instruction for an abuse of discretion.

Here, a day before trial, Detective Santiago Serna spoke by telephone to Morton. She said that she was aware of the trial and would come to court. Detective Serna also took a subpoena to Morton's house in Detroit and, because Morton was not home, Detective Serna gave it to her boyfriend. However, because Morton failed to appear on the first day of trial, the prosecutor obtained a material witness warrant on Morton. Detective Serna thereafter telephoned and spoke with Morton and Morton again told him that she would appear for trial, but that she needed a ride to court.

The next morning, Detective Serna and Detective McLaurin drove to Morton's house in Detroit to drive her to court as arranged, but no one answered the door and no one answered calls to Morton's cell phone and house phone. After he spent twenty minutes attempting to locate Morton, Detective Serna appeared in court to testify. Meanwhile, Detective McLaurin continued his efforts to locate Morton, but failed to find her.[5] Under these circumstances, we hold that the

[5] Defendant's reliance on *People v Bean*, 457 Mich 677, 683 n 11; 580 NW2d 390 (1998) is misplaced. In *Bean*, our Supreme Court found a lack of due diligence because the police had reliable information that the witness moved to the Washington D.C. area, yet the police made no
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prosecutor and police exercised due diligence in their attempts to locate Morton and, therefore, the trial court properly refused to give the missing-witness instruction, CJI2d 5.12. *Perez, supra* at 420.

Affirmed.

/s/ William C. Whitbeck
/s/ Henry William Saad
/s/ Peter D. O'Connell

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attempts to find a Washington phone number or address, and they did not visit the witness's grandmother's Detroit-area home, where the witness was known to have lived in the past. *Id*. at 684-690. Here, there is no evidence that the police failed to trace leads when they had information that could have led to the production of Morton. To the contrary, until the first day of trial, the prosecutor had no reason to believe that Morton would not appear in court or that it would be difficult to locate her. When Morton failed to appear, Detective Serna performed an exhaustive search to locate her by obtaining a material witness warrant for Morton, contacting Morton over the phone and going to her house to drive her to court.